United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1622

DOCKET NO. 74-1622

To be submitted by
George B. Schatz

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

LILLIAN WILLIAMS,

Plaintiff-Appellant,

-against-

ELLIOT L. RICHARDSON, Secretary
of Health, Education and Welfare,

Defendant-Appellee.

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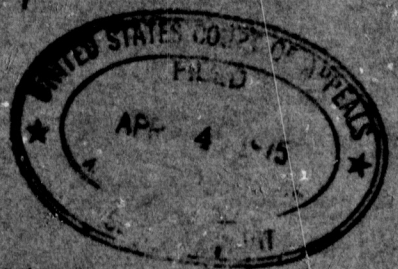
P/s

APPELLANTS BRIEF

RUDES & SCHATZ,
Attorneys for Plaintiff-Appellant



GEORGE B. SCHATZ,
Of Counsel.

UNITED STATES COURT OF APPEALS
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ELLIOT L. RICHARDSON, Secretary
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This is an appeal from a decision of the District Court denying Plaintiff-Appellant's motion for summary judgment and dismissing her complaint.

THE FACTS

Wendell Lee Williams is the illegitmate son of Geraldine Williams, who was 14 years old at the time of his birth, and she is mentally retarded. In 1958, when the child was born, Geraldine's parents, James and Lillian Williams, expressed their intention to adopt the child. The doctor who delivered the baby testified that the mother and her parents were all agreed on the adoption. James and Lillian Williams were residents of West Virginia.

When they went to the local court to institute adoption proceedings they were informed that, under the West Virginia statute, no proceedings could be instituted until a six-month waiting period had passed. The child lived with his grandparents and was raised believing them to be his parents. He was entirely supported by them, and his mother, who never contributed to his support, was periodically institutionalized. A neighbor and James Williams' son and another daughter testified that, in many conversations, the Williamses expressed their intention to adopt the child after the expiration of the waiting period. There is no evidence of contrary intent anywhere in the record. James Williams died two months after the child's birth, in March, 1958. His widow was not able to muster the funds to adopt the child legally until November, 1961.

The widow is now seeking child's insurance benefits under the Social Security Act. A successful claim requires either that the child be found to be James Williams' legally adopted son, or that his widow had adopted him within two years of her husband's death. The Hearing Examiner found that James Williams had equitably adopted the child under West Virginia law and that the widow was accordingly entitled to the benefits. The office of the General Counsel of the Department of Health, Education and Welfare submitted its opinion to the Appeals Council on August 7, 1970, upholding the determination of the Hearing Examiner, andamong other things, stated:

> "We note, however, that the hearing examiner, in addition to his decision with respect to equitable adoption, found

that the child-claimant was the legally adopted child of the deceased wage earner as of the date of his death. It appears that this decision was based on the legal adoption of the child by the wage earner's surviving spouse on November 13, 1961. The adoption was more than two years after the wage earner's death on March 11, 1958. However, with respect to monthly benefits payable after January 1968, it is no longer necessary for the adoption to have been completed within two years of the wage earner's death if the child was living in the wage earner's household at the time of the wage earner's death and the deceased wage earner instituted adoption proceedings before his death. Section 216(e) of the Act.

It seems that the hearing examiner considered that the deceased wage earner had instituted 'proceedings for the adoption of the child' before his death when he went to the appropriate West Virginia court to see about adopting the child-claimant and was advised that they would have to wait six months before proceedings could be commenced to adopt the child.

Section 150, Public Law 90-248, which amended section 216(e) of the Act, wholly eliminated any time period for the completion of a legal adoption where, inter alia, the insured had started some adoption proceeding during his lifetime. This amendment was made to ameliorate an unnecessary strict provision where there was a good faith adoptive intent overtly manifested by the insured before the crucial point in time (here, the death of the insured). House Rep. No. 544, 90th Cong., 1st Sess., p. 52 states:

> 'In some cases, a surviving spouse, due to circumstances beyond her control, is unable to complete within 2 years of the worker's death an adoption started before his death. Your committee believes that where the worker initiated adoption proceedings, or the child was place in the home by an adoption agency, prior to the worker's death, the child lost a source of support on the death of the worker.'

Senate Report No. 744, 90th Cong. 1st Sess., p. 93 contains substantially identical language. While the legislative history

does not specify what acts would constitute the initiation of adoption proceedings it is clear that the provision was intended to be less restrictive with respect to after death adoptions where the child, as you have found in this case, was being supported by the wage earner at the time of his death and thereby lost a source of support. In our opinion this provision requires that the wage earner must, before his death, take some positive action which shows an adoptive intent. Apparently the hearing examiner, on the basis of testimony from the claimant which was corroborated by the testimony of other witnesses at the hearing, found that the wage earner had taken such positive action before his death. Accordingly, if you agree with the hearing examiner and find that the wage earner took the necessary action to institute adoption proceedings before his death you would not be legally precluded from determining that the child-claimant is entitled to benefits for the months after January 1968 as the legally adopted child of the deceased wage earner."

Despite the General Counsel's opinion supporting the Hearing Examiner's decision and on its own motion the Appeals Council set aside the Hearing Examiner's decision. As this constituted a final order the determination became reviewable in Federal Court and an action was brought in the United States District Court, where on plaintiff's motion for summary judgment the Court upheld the Appeals Council's decision and the plaintiff now appeals the District Court's dismissal of her complaint.

POINT I.

THE CASE LAW SUPPORTS PLAINTIFF-APPELLANT'S CONTENTION.

The District Court erred in applying the "substantial evidence test" to the Appeals Council's decision, because that decision was based on its interpretation of a question of law and the substantial evidence test, by statute and case law, applies to agency determinations of questions of fact.

The scope of judicial review of a final decision is set by 42 U.S.C. Sec. 405(g):

> "The findings of the secretary as to any fact, if supported by substantial evidence, shall be conclusive...." (emphasis added).

Brannon v. Ribicoff, 200 F. Supp. 697 (D. Mont. 1961), was an old age benefits case. The plaintiffs prevailed before the Hearing Examiner but that decision was reversed by the Appeals Council. The question turned on whether the plaintiff was employed by a corporation which he and his family had organized. The District Court recognized that the Appeals Council's determination constituted the Secretary's final decision within the meaning of Sec. 405(g), and that, accordingly, its findings of fact were conclusive if supported by substantial evidence. However, the Court found that the Council had, "misconstrued the applicable law," and noted that, in such circumstances,

"the court may property reject the agency's decision." The court proceeded to analyze the applicable law and remanded the matter to the agency for a determination based on the correct legal standard.

Conley v. Ribicoff, 294 F. 2d 190 (9th Cir. 1961), involved old age insurance benefits under the Social Security Act. The problem involved the correct definition of "self-employment income." The Appeals Council had denied review of a decision adverse to the plaintiff, who appealed to the District Court, where his arguments were rejected. The Ninth Circuit reversed. Recognizing that the substantial evidence test of Sec. 205(g) of the Act (42 U.S.C. Sec. 405(g) applied to fact findings and reasonable inference drawn from those facts the Court stated:

> "However, this same finality cannot be applied to the secretary's finding...for that conclusion is the result of an application of the evidentiary facts and their inferences to an erroneous standard, tainted by an incorrect interpretation of the 1956 amendment.
>
> We have before us, therefore, a fully reviewable question of law."

The Court concluded that, under the correct legal standard, the plaintiff was entitled to benefits.

Boyd v. Folsom, 257 F. 2d 778 (3d Cir. 1958) involved a claim for widow's benefits under the Social Security Act. The Court recognized that deference to the agency's determination of evidentiary facts was appropriate,

but stated that the application of a legal standard was reviewable:

> "Our judicial duty therefore is to satisfy ourselves that the agency determination has warrant in the record, viewing that record as a whole, and a reasonable basis of law."

It seems too clear to require support that the issue of "equitable adoption" here involves the determination and application of a legal standard. In related areas, the determination of a child's legitimacy was found to involve the application of a legal standard and thus to be fully reviewable in Mapner v. Flemming, 172 F. Supp. 299 (S.D. N.Y. 1959).

Similarly, the agency's determination of the law of the state of domicile as to the validity of a marriage was found reviewable in a widow's benefits case. Walls v. Celebrezze, 215 F. Supp. 414 (S.D. Tex. 1963).

POINT II.

THE DISTRICT COURT ERRED IN ACCORDING INSUFFICIENT WEIGHT TO THE HEARING EXAMINER'S DETERMINATION.

To the extent that the Appeals Council and the District Court rejected the Hearing Examiner's findings of fact, they erred inasmuch as the facts found depended on his evaluation of witness credibility, which he alone was in a position to weigh, and concerning which there was no contrary evidence.

Longo v. Weinberger, 369 F. Supp. 250 (E.D. Pa. 1974), involved disability benefits. The Court remanded the case, noting that:

> "Such evidence will be of a type where credibility will be a significant factor in evaluation, and, consequently great deference is given to the Hearing Examiner's evaluation and resulting conclusions."

Tucker v. Celebrezze, 220 F. Supp. 209 (N.D. Iowa, W.D. 1963), involved Social Security benefits based on the work record of the claimant's son. The Court notes that agency findings of fact are conclusive under the substantial evidence test and that findings of law are not. The Appeals Council had rejected the Hearing Examiner's findings and conclusions, and the Court stated:

> "It is clear that the Appeals Council's findings are given less weight in a case where they reject the Hearing Examiner's findings than in a case where they sustain the Hearing Examiner's findings..... In such a case in determining the substantiability of the evidence in the record, the Hearing Examiner's report must be considered..... This is even more important where credibility is involved. Heikes v. Flemming, 272 F.2d p. 139, approved the District Court's determination that the Referee's findings shall be followed where credibility is involved rather than the findings of the Appeals Council. (168 F. Supp. 675, 679, of the District Court opinion.)

The Court, in the case of Slaughter v. Gardiner, 292 F. Supp. 568 S.D. W.Va. 1968) said:

> "Great weight must be given to the conclusion of the Hearing Examiner ..... This is obviously so since it is the Hearing Examiner who hears the witnesses testify and who is in a superior position to determine their credibility."

POINT III.

EQUITABLE ADOPTION WAS CLEARLY ESTABLISHED.

The facts in this case meet the recognized tests for equitable adoption. In the analogous case of Davis v. Celebrezzo, 239 F. Supp. 608, (S.D. W.Va., 1965), the wage earner's daughter bore an illegitimate child who was immediately given to the wage earner and his wife to raise. They named the child and had themselves listed as parents on the birth certificate. They were the sole providers of support for the child. The wage earner applied for disability benefits in 1960, having previously listed the child as his daughter on his United Mine Workers Welfare card. The next year, the child's mother returned home for about nine months and gave consent to the formal adoption which took place on December 15, 1962. Immediately thereafter the wage earner filed for child insurance benefits which were denied. The Court noted:

> "Since the facts herein are not in dispute, the provision of Section 205(g) of the Act, 42 U.S.C.A. Sec. 405(g).... is not applicable here. We are only concerned with the legal conclusions to be drawn from the facts."

The Court then cited the sections of the Act controlling the period of adoption Sec. 202(d) (42 U.S.C.A. Sec. 402(d)). The formal adoption took place beyond the two-year period of eligibility, and the Court found that, under Sec. 202, benefits must be denied. The Court then considered the provisions of Secs. 216(e) and (h) (2) (A) which, in effect, provide that an "equitably adopted" child may qualify for benefits. The Court quoted that portion of the

Secretary's brief which stated that no decisions of West Virginia Courts establish the doctrine of equitable adoption, but that the secretary is willing to apply the principle, "in the interest of being as liberal as possible in the interpretation of the Social Security Act."

The Secretary expressed willingness

> "to consider the child in this case as the child of the wage earner if the child could have qualified as such under the principle of equitable adoption in a state in which the principle is applied."

The Court summarized and approved this position as:

> "compatible with his duty to administer this legislation in the broad framework of its humanitarian aim.... and this court can see no reason to disagree therewith."

The Court then turned to the requisites of an equitable adoption and found them to be "a written or oral agreement showing the intention of the parties to adopt and this contract or agreement must be proven by clear, strong, and satisfactory evidence." 239 F. Supp. at 611. The Court found the test to be satisfied by the fact of the case, and distinguished the situation in Spiegel v. Flemming, 181 F. Supp. 185 (N.D. Ohio 1960), which is cited in the secretary's brief in the present case. There, the wage earner accepted a child from an adoption service on the stated understanding that no adoption could be considered before six months. The wage earner died before the period had elapsed. The Court rules that there could be no final agreement to adopt until the period had expired. The situation was described as "unrelated" by the Davis court,

239 F. Supp. at 613, and the facts which distinguish that case from Spiegel, also appear to distinguish the present case from that Ohio district decision.

In Meadows v. Richardson, 347 F. Supp. 154 (S.D. W. Va. 1972), the Court found that the wage earner's daughter's illegitimate child qualified for child's insurance benefits as "equitably adopted" despite an adverse determination by the Appeals Council. The Court quoted the requirements outlined in the Davis language quoted supra. The Court was convinced that, under the Davis test, the Appeals Council's adverse determination was unsupported by substantial evidence when it was established that all parties intended adoption, that the sole reason for delay was the mother's belief that she could not give her consent until she was 21, and that the wage earner had provided all support and housing throughout the child's life.

Surely the present plaintiff-appellant's reason of lack of funds for delay in timely proceeding with the adoption is as compelling as that of the child's mother in the Davis case who delayed consenting to the adoption due to her mistaken belief that she had to be 21 years old to give such consent.

The case of Slaughter v. Gardiner, supra, is distinguishable from the present one. In the Slaughter case the Hearing Examiner denied the claim of equitable adoption, and there was deeply contradictory evidence as to the parties' intent. The examiner found that the testimony of several witnesses was less than credible, and the Court found that the Hearing Examiner was in

the best position to determine the credibility of the witnesses and evaluate their testimony.

The Slaughter case is reinforcement for the proposition that, where the intent to adopt clearly appears on an uncontested record and the witnesses convince the examiner, an equitable adoption should be recognized.

The case of Smith v. Richardson, 347 F. Supp. 265 (S.D. W. Va. 1972), is also distinguishable from the plaintiff-appellant's situation. The evidence before the Hearing Examiner did not show that the parties had ever finally decided upon adoption of the child. The natural mother's testimony indicated that she considered herself able to take her child back at any time, and the grandparents took no steps to adopt the child, although they supported him for nearly 18 years. At the time of the hearing the child was living with his natural mother in Ohio.

POINT IV.

THE DECISION OF THE HEARING EXAMINER SHOULD BE RE-INSTATED.

Upon all the evidence adduced at the hearing, together with all the exhibits now of record, the Hearing Examiner made the following findings:

1. The child, Wendell Lee Williams, was born on January 29, 1958 and has lived with the claimant up until the present time and she has supported him entirely.

2. Subsequent to the birth of the child, and prior to the death

of the wage earner, James O. Williams, the mother of the child, Geraldine Williams, and the claimant and the wage earner agreed among themselves that because of the youth of the mother of the child, and her mental impairments that in the best interest of the child the wage earner and the claimant would adopt this child as their own.

3. Prior to the death of the wage earner (March 11, 1958) he and the claimant went to the appropriate court in West Virginia where they were advised they would have to wait for six months before any proceeding could be commenced for the adoption of the child, Wendell Lee Williams, by the wage earner and the claimant.

4. It was the intention of the wage earner and the claimant to adopt this child, Wendell Lee Williams, as their own but the wage earner died prior to the expiration of the six-month period.

5. A decree was entered and recorded in Fayette County, West Virginia, on November 13, 1961, wherein the child, Wendell Lee Williams, was the legally adopted child of the claimant, Lillian Williams.

6. Under applicable laws of West Virginia there was an equitable adoption of the child, Wendell Lee Williams, by the wage earner, James O. Williams, which would have qualified the child to share as the wage earner's child in the intestate personal property of the law of the State of West Virginia.

7. The child, Wendell Lee Williams, may be deemed to be the legally adopted child of the wage earner as of the date of his death and/or equitable adopted child of the wage earner, James O. Williams, before his death for the purposes of entitlement to child's insurance benefits.

CONCLUSION

Upon the foregoing findings the Hearing Examiner decided that the child, Wendell Lee Williams, is entitled to insurance benefits based upon the earnings record of the deceased wage earner, and the claimant, Mrs. Lillian Williams, is entitled to mother's insurance benefits because she had in her care a child of the wage earner entitled to child's insurance benefits and their application, filed on October 18, 1967, should be granted within the meaning of the Social Security Act, as amended, and the Hearing Examiner's decision should be reinstated and plaintiff awarded judgment accordingly.

Respectfully submitted,

RUDES & SCHATZ,
Attorneys for Plaintiff-Appellant

GEORGE B. SCHATZ,
Of Counsel.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

LILLIAN WILLIAMS,

Plaintiff-Appellant,

-against-

ELLIOT L. RICHARDSON, Secretary of Health, Education and Welfare,

Defendant-Appellee.

AFFIDAVIT

DOCKET NO. 74-1622

STATE OF NEW YORK)
) SS.:
COUNTY OF NASSAU)

LILLIAN S. KLARMAN, being duly sworn, deposes and says, that deponent is not a party to the action, is over 21 years of age and resides at Nassau County, New York.

That on the 25th day of March, 1975, deponent served the Appellant's Brief and Joint Appendix upon DAVID G. TRAGER, ESQ., United States Attorney, Eastern District of New York, attorney for Defendant-Appellee in this action, at Federal Building, Brooklyn, N.Y. 11201, the address designated by said United States Attorney for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Post Office Department within the State of New York.

Sworn to before me this
25th day of March, 1975.

Lillian S. Klarman

Nathaniel S. Rudes

NATHANIAL S. RUDES
NOTARY PUBLIC, State of New York
No. 30-3393575
Qualified in Nassau County
Term Expires March 30, 1975

LAW OFFICES
RUDES & SCHATZ

UNITED STATES COURT OF APPEALS
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-against-

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Defendant-Appellee.

AFFIDAVIT

DOCKET NO. 74-1622

STATE OF NEW YORK)
COUNTY OF NASSAU) SS.:

LILLIAN S. KLARMAN, being duly sworn, deposes and says, that deponent is not a party to the action, is over 21 years of age and resides at Nassau County, New York.

That on the 3rd day of April, 1975, deponent served the Joint Appendix upon DAVID G. TRAGER, ESQ., United States Attorney, Eastern District of New York, attorney for Defendant-Appellee in this action, at Federal Building, Brooklyn, N.Y. 11201, the address designated by said United States Attorney for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Post Office Department within the State of New York.

Sworn to before me this
3rd day of April, 1975.

Lillian S. Klarman

GEORGE B. SCHATZ
Notary Public, State of New York
No. 30-3481750
Qualified in Nassau County
Commission Expires March 30, 1977

LAW OFFICES
RUDES & SCHATZ

STATE OF NEW YORK, COUNTY OF ss.: **INDIVIDUAL VERIFICATION**

, being duly sworn, deposes and says that deponent is the in the within action; that deponent has read the foregoing and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true.

Sworn to before me, this day of 19 .....

STATE OF NEW YORK, COUNTY OF ss.: **CORPORATE VERIFICATION**

, being duly sworn, deposes and says that deponent is the of the corporation named in the within action; that deponent has read the foregoing and knows the contents thereof; and that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true.

This verification is made by deponent because is a corporation. Deponent is an officer thereof, to-wit, its

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me, this day of 19 .....

STATE OF NEW YORK, COUNTY OF **CERTIFICATION BY ATTORNEY**

The undersigned, an attorney admitted to practice in the courts of New York State, certifies that the within has been compared by the undersigned with the original and found to be a true and complete copy.

Dated: .....

STATE OF NEW YORK, COUNTY OF **ATTORNEY'S AFFIRMATION**

The undersigned, an attorney admitted to practice in the courts of New York State, shows: that deponent is

the attorney(s) of record for in the within action; that deponent has read the foregoing and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. Deponent further says that the reason this verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated: .....

STATE OF NEW YORK, COUNTY OF ss.: **AFFIDAVIT OF SERVICE BY MAIL**

being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at

That on the day of 19 deponent served the within upon attorney(s) of in this action, at the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in—a post office—official depository under the exclusive care and custody of the United States post office department within the State of New York.

Sworn to before me, this day of 19

.....

STATE OF NEW YORK, COUNTY OF ss.: **AFFIDAVIT OF PERSONAL SERVICE**

NOTICE OF ENTRY

Sir : PLEASE TAKE NOTICE that the within is a true copy of a

duly entered in the office of the clerk of the within named court

on 19

Dated: 19

Yours, etc.,

RUDES & SCHATZ

Attorneys for

Office and Post Office Address
149 BROADWAY
LYNBROOK, N. Y. 11563

To:

Attorney for

NOTICE OF SETTLEMENT

Sir : PLEASE TAKE NOTICE that

of which the within is a true copy will be presented for settlement to Mr. Justice

one of the Justices of the within named Court at

on the day of 19

at M.

Dated: 19

Yours, etc.,

RUDES & SCHATZ

Attorneys for

Office and Post Office Address
149 BROADWAY
LYNBROOK, N. Y. 11563

To: Esq .

Attorney for

Index No: 74-1622 19

UNITED STATES COURT OF APPEALS
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Defendant-Appellee.

AFFIDAVIT OF SERVICE

RUDES & SCHATZ

Attorneys for Plaintiff-Appellant,

Office and Post Office Address
149 BROADWAY
LYNBROOK, N. Y. 11563
(516) LYNBROOK 3-7100

To: Esq .

Attorney for

Service of a copy of the within

is hereby admitted.

Dated, N. Y., 19

Attorney for